

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

<p>NANA Management Services, LLC</p> <p>Employer</p> <p>and</p> <p>Laborers Local 942, affiliated with the Alaska District Council of Laborers and the Laborers International Union of North America</p> <p>Petitioner</p>	<p>Cases 19-RC-264745, 19-RC-264750, 19-RC-264753.</p>
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**Laborers Local 942's Motion to Exclude Post-Hearing Declaration
Filed by NANA Management Services**

I. Introduction

Laborers Local 942 respectfully requests that the Jeannette Duenow declaration, which was first submitted by NANA Management Services, LLC with its Post-Hearing Brief, be excluded from the evidentiary record. First, the pre-election hearing was the proper time for the submission of evidence and the opportunity for cross-examination of any witnesses. Second, the declaration is improper given that there has been no showing that the declarant was unavailable for testimony at the hearing. Because the Duenow declaration, dated September 17, 2020, was first submitted with the Employer's Post-Hearing Brief and without an opportunity for cross-examination, the declaration should be excluded from evidence.

II. Argument

After the pre-election hearing held on September 10, 2020, the submission of new evidence is improper and would unfairly prejudice Laborers Local 942, which did not have an opportunity to evaluate or respond to the new evidence during the hearing. The Representation Casehandling Manual and Board rules and regulations governing representation proceedings make clear that the record evidence is established during the hearing itself, not after the close of the hearing. Section 102.66(a) of the Board rules and regulations provides that parties have the right to introduce relevant evidence at the hearing.¹ According to the Casehandling Manual, the purpose of the hearing “is to adduce record evidence” and “to make a full record.”²

The Casehandling Manual explains the closure of the hearing: “Generally the hearing should be closed only after all parties have been asked if they desire to add anything further and the Hearing Officer is satisfied that the record contains sufficient evidence for Regional Director and the Board to decide the issue(s) litigated at the hearing.”³ The Manual provides that any outstanding exhibits should be provided for at the hearing: “If exhibits are outstanding, provision for their receipt should be made. . . . The Hearing Officer should be certain the reporter has all exhibits.”⁴

¹ 29 C.F.R. § 102.66(a).

² National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings § 11181 (September 2020).

³ *Id.* at § 11240.

⁴ *Id.*

Exceptions to the general principle that the hearing is the proper time for admission of evidence are extremely narrow. Under section 102.65(e)(1) of the rules and regulations, “A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record.”⁵ But in this case, there was no motion to reopen the record, and no extraordinary circumstances exist that would justify post-hearing evidence.

Admitting the record evidence during the hearing, when both parties are present, provides the other party with an opportunity to evaluate the evidence as well as an opportunity to cross examine any witnesses. Here, Laborers Local 942 did not have an opportunity to cross examine Jeannette Duenow at the hearing or to analyze and respond to her testimony. Admitting this post-hearing evidence would violate fair hearing procedures.

Finally, the Employer has not put forth any explanation of why the declarant was unavailable to testify at the hearing or to justify the post-hearing submission of the declaration. Affidavits and declarations are not the best evidence and should not be admitted following closure of the hearing.⁶

⁵ 29 C.F.R. § 102.65(e)(1).

⁶ *See generally* NLRB Division of Judges, Bench Book § 16–804.3 (Oct. 2015) (“[A]ffidavits generally are received substantively only if the declarant is deceased or unavailable, or the taking of testimony poses a threat to the health of the witness. This is because there is no opportunity for the opponent to cross-examine or the judge to observe demeanor.”).

III. Conclusion

Given that the declaration was first submitted with the Employer's Post-Hearing Brief after the closure of the evidentiary record, Laborers Local 942 requests that the Duenow declaration be excluded from the record in the three cases 19-RC-264753, 19-RC-264750, and 19-RC-264745.

Laborers Local 942 further requests that the election be scheduled in an expeditious manner without unnecessary delay and that, if needed, unresolved issues be resolved post-election.

Respectfully submitted this 23rd day of September 2020.

/s/ Khalial Withen

Khalial Withen
General Counsel for Petitioner
Laborers Local 942

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, an electronic copy of Petitioner's Motion was served on the Employer named above at this email address:

MOBrien@perkinscoie.com

DATED this 23rd day of September 2020.

/s/ Khalial Withen
Khalial Withen